92-152

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CRAIG FEINSTEIN,

Petitioner,

v.

CITY OF LOS ANGELES,
a Municipal Corporation;
DARYL F. GATES,
Chief of Police

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL FOR THE
STATE OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1. Whether due process of law required by the Fourteenth Amendment to the United States Constitution requires that a public employee with a vested property interest in his job be allowed the opportunity to pursue a post-termination appeal.

2. Whether an administrative "appeal authority" may, consistent with due process of law required by the Fourteenth Amendment to the United States Constitution, transmute punishment meted out to the public employee from a minor suspension to a termination.

3. Whether due process of law required by the Fourteenth Amendment to the United States Constitution requires that punishment be fixed before the public employee is forced to exercise his right of appeal.

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OPINIONS BELOW

The unpublished decision of Division II in the Second District Court of Appeal for the State of California is appended hereto as Appendix A. The denial of FEINSTEIN's petition for rehearing in the same court is appended hereto as Appendix C. The denial of FEINSTEIN's petition for review by the Supreme Court of the State of California is found in Appendix E.

JURISDICTION

The order sought to be reviewed was made and entered on September 30, 1992. The order denying FEINSTEIN's timely motion for rehearing was made and entered on October 16, 1992. The order denying FEINSTEIN's petition for review to the

Supreme Court of the State of California was made and entered on December 17, 1992. The statutory provision believed to confer jurisdiction on this court to review the judgment in question is 28 U.S.C. Sec. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution, § 1, Clause 2:
". . . nor shall any State deprive any person of . . . property without due process of law. . . ."

STATUTES AND ORDINANCES

CAL. GOV'T CODE §3300-3311 (Deering 1982 & Supp. 1992), attached hereto as Appendix H.

LOS ANGELES, CA., CITY CHARTER art. XIX, §202(2), attached hereto as Appendix I.

STATEMENT OF THE CASE

FEINSTEIN, a "public safety officer" with a vested property interest in his job pursuant to the "Public Safety Officers' Procedural Bill of Rights Act" (CAL. GOV'T CODE §§ 3300-3311 (Deering 1982 & Supp. 1992), hereinafter "Bill of Rights Act"), had been employed by the CITY OF LOS ANGELES in that capacity for a period of approximately nine years, when, on February 8, 1990, he was accused in a personnel complaint of committing "several traffic violations" while off duty. (CT. 3, 23, 133)

Disciplinary actions against L.A.P.D. officers are governed by the Los Angeles City Charter. Under Article XIX, § 202(2), the Chief of Police must convene a "Board of Rights" (hereinafter "Board") in order to impose punishment in excess of a 30-day suspension, with reprimand. Lesser punishments may be imposed unilaterally, subject to the officer's right of appeal to a Board. (CT. 32, 34-35)

The Chief of Police followed the recommendation of FEINSTEIN's commanding officer that he impose a 10-day suspension and FEINSTEIN appealed, thus causing a Board to be convened.[1] (CT. 3, 5, 133)

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[1] If FEINSTEIN had not appealed, his punishment could not have been increased. Hopson v. City of Los Angeles, 139 Cal.App.3d 347, 352, 188 Cal.Rptr. 689, 692 (1983).

On November 20, 1990, at the conclusion of the Board hearing, the Board announced its decision to recommend that FEINSTEIN be removed from his position as a police officer. (CT. 547) The recommendation was approved by the Chief of Police, and FEINSTEIN's employment was officially terminated on December 11, 1990. (CT. 43)

Because FEINSTEIN had no prior notice that the City was seeking his removal, he produced no evidence of mitigating circumstances, nor did he produce character witnesses during the penalty phase of the Board hearing. (CT. 13, 528) He had no opportunity to pursue an administrative appeal from the decision to terminate his employment.

On November 14, 1991, FEINSTEIN filed a petition for peremptory writ of mandate in the trial court seeking to overturn the removal decision on the basis that, among other things, his due process rights were violated by the Board's decision to increase his punishment from a 10-day suspension to a termination. (CT. 103, 108-120)

The trial court held that FEINSTEIN's contention in this regard was "seriously vitiated by Holcomb v. City of Los Angeles (1989) 210 Cal.App.3d 1560" and that his argument that Holcomb was wrongly decided "misconceives of the power of an inferior court with respect to the decisions of appellate courts." (CT. 163-164)

The petition was denied, and judgment was entered against FEINSTEIN on December 19, 1991. (CT. 169-170)

FEINSTEIN appealed to the Second District Court of Appeal for the State of California. In his appeal, he asserted that he was denied due process by the failure to notify him of the "proposed action" (i.e., termination) prior to the Board hearing and the failure to provide him with a post-termination hearing. (Appendix F, pages 13-15; Appendix G, pages 9-27) The court affirmed the trial court's judgment, relying upon its prior decision in Holcomb as support for the proposition that FEINSTEIN had "sufficient notice of the possibility of greater punishment" (emphasis added). (Appendix A, page 12) Although the court defined one of the issues presented by FEINSTEIN's appeal as whether he was "provided with any meaningful avenue of administrative appeal after the removal decision was made" (Appendix A, pages

8-9), its decision completely failed to address that issue. (Appendix A)

FEINSTEIN filed a petition for rehearing in the appellate court, pointing out its failure to address his claim that constitutional guarantees of due process require a post-termination hearing. (Appendix B, page 4) His petition for rehearing also took exception with the court's characterization of the Los Angeles City Charter as providing notice of the "possibility" of removal to an officer who "opts" for a Board of Rights hearing after action is taken to impose a minor suspension. (Appendix B, page 4)

The petition for rehearing was denied without comment by order dated October 16, 1992. (Appendix C)

FEINSTEIN then petitioned for review to the Supreme Court of the State of California, limiting the issues presented for review to the constitutional due process issues raised herein. (Appendix D)

The petition for review was denied without comment on December 17, 1992. (Appendix E)

DUE PROCESS IS DENIED WHEN TERMINATION IS IMPOSED AT THE LAST STAGE OF APPEAL FROM A LESSER PUNISHMENT

Public agencies should not be allowed to circumvent post-termination due process procedures by imposing the penalty of termination at the last stage of appeal from a lesser punishment. When a public agency's appeal authority is empowered to increase the recommended

punishment, the undesirable consequences include:

1. Public agencies are given free rein to retaliate against employees who exercise their right of appeal;

2. Employees are deprived of the ability to intelligently exercise their right of appeal, because without a fixed punishment it is impossible to know what is being appealed from;

3. Employees appealing from a reprimand or minor suspension must produce character witnesses whose participation would otherwise be unnecessary; and

4. Employees must risk termination in order to appeal from a reprimand or minor suspension.

In a fairly recent line of cases, public agencies have sought to take advantage of statutes authorizing the

administrative appeal authority to "modify" punishments (e.g., Andersen v. Civil Serv. Comm'n, 122 Cal.App.3d 577, 579, 176 Cal.Rptr. 66, 67 (1981)) or which are merely silent as to the appeal authority's scope of power[2] (e.g., Holcomb v. City of Los Angeles, 210 Cal.App.3d 1560, 259 Cal.Rptr. 1 (1989)) to effectuate a harsher punishment from which the employee cannot appeal because the harsher punishment is imposed, for the first time, at the final stage of an appeal from a lesser punishment.

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[2] In this case, the governing ordinance (LOS ANGELES, CA., CITY CHARTER, art. XIX, § 202(2)) simply states that a Board of Rights may impose certain punishments, up to and including termination, but does not specify whether termination may be imposed upon appeal from a lesser punishment. The City Charter calls for the Board to act as the initial disciplinary authority in some instances, and as the appeal authority in other instances.

FEINSTEIN's case is apparently the first, nationwide, wherein this insidious procedure has been successfully applied to effectuate termination. In a case strikingly similar to FEINSTEIN's, but decided after FEINSTEIN's petition for review to the California Supreme Court was denied, another appellate court distinguished termination from lesser forms of discipline and endorsed the arguments urged in this petition:

> The present case differs in that the commission here did not simply increase the duration of Paoli's suspension but imposed the entirely different penalty of termination. Termination is the most extreme penalty that can be imposed in the employment context, depriving

the employee of the means of livelihood and making it more difficult to find other employment because of the questionable circumstances under which the prior job ended. (See, Cleveland Board of Education v. Loudermill (1985) 470 U.S. 532, 543 [84 L.Ed.2d 494, 504-505, 105 S.Ct. 1487].) By contrast, a suspension does not destroy but merely interrupts employment. (Civil Service Assn. v. City and County of San Francisco (1978) 22 Cal.3d 552, 562 [150 Cal.Rptr. 129, 586 P.2d 162].) The change from an order imposing a 30-day suspension to an order terminating employment does not simply change an

incidental detail but alters the fundamental nature and effect of the originally imposed punishment. Neither Andersen nor recognized definitions allow a change of this kind to be viewed as a 'modification.'

Indeed, to view the commission's authority to 'modify' disciplinary orders as allowing it to change an order of suspension to one of termination would violate employees' right to due process. Due process requires that before punitive action is taken an employee must be given notice of the proposed disciplinary action and an

opportunity to respond. (Skelly v. State Personnel Bd., supra, 15 Cal.3d 194, 215; Cleveland Board of Education v. Loudermill, supra, 470 U.S. at p.546 [84 L.Ed.2d at p.506].) In the present case, Paoli was given notice of and an opportunity to respond to the proposed 30-day suspension; he was never informed that he faced outright termination of his employment. While the ordinance authorizing the commission to 'modify' a disciplinary order may be viewed as providing notice that an initial order might be altered in a manner unfavorable

> to the employee (Andersen, supra, 122 Cal.App.3d at p.580), it cannot be seen as giving the employee notice that a manner of punishment totally different from that imposed by the appointing authority might be imposed after an appeal to the commission. Accordingly, the commission exceeded its authority under the Mendocino County Civil Service Ordinance by changing the appointing authority's order of suspension to an order of termination.

Paoli v. Civil Serv. Comm'n, 12 Cal.App.4th 1073, 1077-78, 15 Cal.Rptr.2d 874, 876-77 (1993).

Most decisions take for granted that a post-termination evidentiary hearing is needed to satisfy constitutional due

process requirements. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985); Coleman v. Dep't of Personnel Admin., 52 Cal.3d 1102, 1119, 805 P.2d 300, 309, 278 Cal.Rptr. 346, 355 (1991); Skelly v. State Personnel Bd., 15 Cal.3d 194, 205, 539 P.2d 774, 782, 124 Cal.Rptr. 14, 22 (1975).

Indeed, one California decision interprets the statute giving FEINSTEIN a vested property interest in his job, the Bill of Rights Act (more specifically, CAL. GOV'T. CODE § 3304(b) (Deering 1982)), as requiring a post-termination hearing. Doyle v. City of Chino, 117 Cal.App.3d 673, 679-80, 172 Cal.Rptr. 844, 847 (1981).

Even when an employee admits facts which allegedly constitute "just cause" for termination, a formal post-termination evidentiary hearing must be

provided so that the employee may contest the severity of the punishment. Kelly v. Smith, 764 F.2d 1412, 1415 (11th Cir. 1985); Crain v. Bd. of Police Comm'rs, 920 F.2d 1402, 1414-15 (8th Cir. 1990) (Gibson, J., dissenting).

FEINSTEIN's case is not the first, nor will it be the last, in which an administrative appeal authority's power to increase the punishment meted out to an employee is called into question. At the very least, the power to transmute a punishment appealed from into an entirely different class of punishment[3] raises fundamental due process concerns. It may safely be assumed that numerous public

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[3] It is well recognized that termination is so profoundly different from other forms of punishment or discipline that additional due process safeguards are required. (See excerpt from Paoli, quoted at page 12-16 of this brief.)

agencies have vested their administrative appeal authorities with the power to "modify" the punishment imposed in the initial disciplinary action (see, e.g., Cleveland Bd. of Educ. v. Loudermill, 470 U.S. at 537, fn.1), or have authorized them to impose a wide range of punishments without stating whether the initial punishment may be increased, (as in FEINSTEIN's case).

FEINSTEIN's case is a compelling example of how the constitutional right of due process can be obfuscated by bureaucratic bungling and myopic, pro forma judicial review. The opportunity to correct a grave injustice and fill the vacuum of Supreme Court precedent concerning post-termination due process should be seized.

CONCLUSION

This court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

Dated: 3/16/93

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